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March 20, 2017

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Proposal to Amend Recordkeeping Regulation 1.31 (RIN 3038-AE36)

Dear Mr. Kirkpatrick:

The Investment Company Institute (“ICI”)¹ is writing to commend the Commodity Futures Trading Commission (“CFTC” or “Commission”) on its recent proposal (“Proposal”) to amend Regulation 1.31 under the Commodity Exchange Act (“CEA”), and to provide feedback on questions the Commission raises in the Proposal.² We support the CFTC’s efforts to modernize the manner in which records, particularly electronic records, must be maintained under the CEA and Commission regulations. We believe the Commission’s Proposal must go further, however, to permit investment advisers that are registered with the Securities and Exchange Commission (“SEC”) and advise SEC-registered investment companies (“funds”), to satisfy their CFTC recordkeeping obligations through substituted compliance, by complying with the comprehensive SEC recordkeeping obligations to which they already are subject.

¹ ICI is a leading global association of regulated funds, including mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$18.9 trillion in the United States, serving more than 95 million US shareholders, and US\$1.6 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

² *Recordkeeping*, 82 Fed. Reg. 6356 (Jan. 17, 2017), available at <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2017-01148a.pdf> (“Proposing Release”).

As the Proposing Release notes, this initiative was prompted in large measure by two industry rulemaking petitions, including a 2014 petition filed by ICI.³ We commend the Commission for seeking to update and modernize Regulation 1.31, its core recordkeeping rule, in response to industry concerns. The Proposal would eliminate many outdated technological requirements and specifications of the rule, while still allowing for appropriate maintenance of records by, or on behalf of, entities subject to the CFTC's recordkeeping rules.

Our letter contains two sections. Section I responds to the Commission's question asking whether the Proposal "will resolve all outstanding issues regarding compliance with part 4 of the Commission's regulations identified [in the rulemaking petitions]."⁴ We explain that the Proposal does not address the core issue raised in the ICI Rulemaking Petition — namely, that the Commission, consistent with its 2013 harmonization rulemaking,⁵ should permit SEC-registered investment advisers that (i) are registered with the CFTC as commodity pool operators ("CPOs") and/or commodity trading advisors ("CTAs"), and serve as such to registered funds and/or their controlled foreign corporations ("CFCs") ("registered fund CPOs and CTAs"), or (ii) rely on the exclusion from the definition of CPO in Regulation 4.5 and/or the exemption from registration as a CTA in Regulation 4.14(a)(8) or another available exemption ("excluded and exempt CPOs and CTAs"), to satisfy their recordkeeping obligations under CFTC rules through substituted compliance with the recordkeeping rules under the Investment Company Act of 1940 ("Investment Company Act") and the Investment Advisers Act of 1940 ("Advisers Act").⁶ We also believe that any third parties that hold "required records" on behalf of registered fund CPOs and CTAs and/or excluded and exempt CPOs and CTAs should be entitled to substituted compliance with respect to their recordkeeping for these entities, because they are keeping records for persons that themselves should be able to rely on substituted compliance.

Our recommendation that the CFTC amend its recordkeeping rules to permit substituted compliance by registered fund CPOs and CTAs, excluded and exempt CPOs and CTAs, and their third-party recordkeepers, is fully consistent with the regulatory objectives articulated recently in the Trump Administration's two executive orders aimed at alleviating unnecessary costs and burdens of

³ See Petition for Rulemaking to Amend CFTC Regulations 4.12(c)(3), 4.23 and 4.33, by Investment Company Institute, dated March 11, 2014, available at <https://www.ici.org/pdf/27946.pdf> ("ICI Rulemaking Petition"); Petition for Rulemaking to Amend 1.31, 4.7(b) and (c), 4.23 and 4.33, Managed Funds Association, Investment Adviser Association, and Alternative Investment Management Association, dated July 21, 2014.

⁴ Proposing Release, *supra* note 2, at 6363.

⁵ See *Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 78 Fed. Reg. 52308 (Aug. 22, 2013) ("Harmonization Release").

⁶ These excluded or exempt advisers are also covered by Regulation 1.31, to the extent they maintain "required records" as such term is defined in the Proposal.

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government regulations,⁷ as well as the agenda for the CFTC recently presented by acting Chairman Giancarlo.⁸ In particular, as discussed more fully below, permitting registered fund advisers, which already are subject to comprehensive regulation by the SEC, to satisfy their recordkeeping obligations under the CEA through substituted compliance, will further Acting Chairman Giancarlo's goals of: (i) reducing regulatory burdens (project KISS) – applying CFTC rules in ways that are simpler, less burdensome and less of a drag on the American economy; and (ii) resetting the CFTC's focus on its core mission – including working cooperatively with parallel market regulators, such as the SEC, to achieve that result.⁹ Importantly, substituted compliance will achieve these goals with no loss of investor protection.

Section II expresses our support for the comment letter that is being submitted by our fellow trade associations, the Managed Funds Association, the Investment Adviser Association, and the Alternative Investment Management Association (collectively, the “Associations”).¹⁰

I. Substituted Compliance for Registered Fund CPOs and CTAs, Excluded and Exempt CPOs and CTAs, and Their Third-Party Recordkeepers

The Commission specifically requests comment in the Proposing Release as to whether the Proposal will resolve all outstanding issues regarding compliance with part 4 of the Commission's regulations identified in the rulemaking petitions. It will not, and further amendments to the Commission's rules are necessary to avoid regulatory duplication and unnecessary costs that will ultimately be borne by registered fund shareholders.

Consistent with our request in the ICI Rulemaking Petition, we urge the Commission to permit registered fund advisers, whether or not registered as CPOs and CTAs with the Commission, to satisfy their recordkeeping obligations under the CFTC's rules through substituted compliance with

⁷ See Exec. Order, Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>; *see also* Exec. Order, Enforcing the Regulatory Reform Agenda (Feb. 24, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>.

⁸ Acting Chairman J. Christopher Giancarlo, *CFTC: A New Direction Forward, Remarks before the 42nd Annual International Futures Industry Conference*, Boca Raton, Florida (March 15, 2017), *available at* <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20> (“A New Direction Forward”).

⁹ *See id.*

¹⁰ Letter to Christopher Kirkpatrick, Secretary, Commodity Futures Trading Commission, from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association; Karen Barr, President and Chief Executive Officer, Investment Adviser Association; and Jiří Król, Deputy CEO, Global Head of Government Affairs, Alternative Investment Management Association, dated March 20, 2017 (“Associations Comment Letter”).

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the recordkeeping rules under the Investment Company Act and Advisers Act. We request substituted compliance treatment for registered fund advisers both with respect to the content of records to be kept, and the manner of keeping such records. Specifically, we recommend that the Commission amend (i) Regulation 1.31 as it relates to excluded and exempt CPOs and CTAs and their third-party recordkeepers; (ii) Regulation 4.12(c) under the CEA, which contains exemptions from Subpart B of the Commission's Part 4 regulations, (iii) Regulation 4.23 under the CEA, which contains recordkeeping requirements applicable to CPOs and their third-party recordkeepers, and (iv) Regulation 4.33 under the CEA, which contains recordkeeping requirements applicable to CTAs. We request that the CFTC, through these amendments, permit (i) registered fund CPOs and CTAs; (ii) excluded and exempt CPOs and CTAs; and (iii) third parties that maintain required records on behalf of registered fund CPOs and CTAs and/or excluded and exempt CPOs and CTAs, to satisfy their recordkeeping obligations under CFTC rules through substituted compliance with the recordkeeping rules under the Investment Company Act and the Advisers Act.¹¹ Our recommendations are detailed in Appendix A to this letter.

Registered fund advisers, whether or not they are registered with the CFTC as CPOs and/or CTAs, already are subject to a comprehensive recordkeeping regime with respect to their operations and the funds they manage under the Investment Company Act and the Advisers Act and the rules thereunder.¹² This recordkeeping regime serves the same regulatory purposes as the CFTC's recordkeeping regulations and is tailored to registered funds, CFCs, and their advisers. Furthermore, the CFTC would have full access to these records if the CFTC amends its rules to provide substituted compliance for these entities. As a result of the changes to the Part 4 regulations made in 2012,¹³ many

¹¹ We also request that this substituted compliance treatment extend to SEC-registered fund advisers that are registered as CPOs and CTAs, and serve as CPOs and CTAs to business development companies ("BDCs"), as well as SEC-registered fund advisers that rely on CFTC no-action relief available to BDCs. BDCs are not "investment companies" registered under the Investment Company Act as specified in CFTC Regulation 4.5, but rather entities exempt from registration under the Investment Company Act by virtue of the filing of an election to be treated as a BDC under Section 54 of the Investment Company Act and, as such, Regulation 4.5 does not apply. Therefore, absent relief from the Division of Swap Dealer and Intermediary Oversight ("Division"), a BDC's operator would be required to register as a CPO. However, CFTC Letter No. 12-40 provides no-action relief such that the Division would not recommend that the Commission take an enforcement action against the operator of a BDC provided that the BDC satisfies certain criteria (similar marketing and *de minimis* commodity interest trading limitations to those included in Regulation 4.5) and has properly filed a notice with the CFTC to rely on the relief. See CFTC Letter 12-40 (Dec. 4, 2012), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/12-40.pdf>. We therefore request that CPOs of BDCs that meet the conditions in CFTC Letter No. 12-40 be treated the same as operators of Regulation 4.5 registered funds for purposes of the Commission's amended recordkeeping regulations.

¹² Similarly, SEC-registered investment advisers to BDCs are subject to the recordkeeping provisions of the Advisers Act and the Investment Company Act. See Section 64(a) of the Investment Company Act.

¹³ See *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (Feb. 24, 2012), amended by *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 17328 (Mar. 26, 2012) (collectively, "Regulation 4.5 Adopting Release").

investment advisers (and sub-advisers) to registered funds and CFCs are now also registered as CPOs or CTAs and consequently are subject to dual regulation by the CFTC and the SEC with respect to recordkeeping, which is inefficient and costly to these entities, and to registered fund shareholders. To the extent excluded and exempt CPOs and CTAs are also subject to Regulation 1.31 because they have “required records” (*e.g.*, trading and disclosure records to demonstrate their ability to rely on an exclusion or exemption), they would also be subject to dual regulation, which would impose additional costs on registered fund shareholders. Moreover, if the Commission provides for a substituted compliance approach as we recommend, third parties that maintain “required records” on behalf of registered fund CPOs and CTAs and/or excluded and exempt CPOs and CTAs should not be subject to additional recordkeeping requirements if the registered advisers themselves are not subject to those requirements.¹⁴

When the CFTC narrowed the Regulation 4.5 exclusion for registered funds and their operators, it indicated that these changes might result in inconsistent regulation of registered fund CPOs and CTAs, and that, accordingly, it was proposing to harmonize its rules with those of the SEC.¹⁵ Consequently, at the same time it issued the Regulation 4.5 Adopting Release, the CFTC issued a companion release stating its intention to harmonize certain of its rules with the corresponding SEC rules in the areas of disclosure, reporting and recordkeeping requirements for registered fund CPOs.¹⁶

ICI appreciates that some limited recordkeeping relief was granted in the Harmonization Release.¹⁷ We note, however, that much of that relief (specifically, the ability to keep records with certain third-party recordkeepers and the relief from the CFTC’s subsidiary ledger requirement) sought to modernize the CFTC’s recordkeeping rules for all CPOs. The only aspect of the relief specific to registered fund CPOs avoided a direct conflict with the federal securities laws.¹⁸ And, in certain

¹⁴ To the extent a registered investment adviser keeps books and records with third parties, the name and address of the third party recordkeepers, and the types of books and records they keep, must be included in response to Item 1.L of Form ADV, Part 1A, which is available to the public on the IAPD website. Similarly, a registered fund is required to disclose in its registration statement the name and address of each person that maintains the fund’s required books and records. *See* Item 33 of Form N-1A and Item 32 of Form N-2.

¹⁵ Regulation 4.5 Adopting Release, *supra* note 13, at 11255.

¹⁶ *See Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 77 Fed. Reg. 11345, at 11350 (Feb. 24, 2012) (proposing release for harmonization) (“To address the commenters’ concerns about the content and timing of disclosure documents, account statement delivery and certification, and *recordkeeping* requirements, the Commission is proposing to harmonize its regulatory requirements with those of the SEC to reduce the costs for dual registrants. Each of these harmonizing provisions involves recordkeeping and reporting obligations that would be a collection of information under the [Paperwork Reduction Act].”) (emphasis added).

¹⁷ Harmonization Release, *supra* note 5.

¹⁸ The recordkeeping relief specific to registered fund CPOs is contained in Regulation 4.12(c)(3)(iii), which exempts registered fund CPOs from having to make their records available to participants for inspection or copying. *See id.* at 52321.

instances, the Commission's rules were not fully conformed.¹⁹ Given the robust recordkeeping requirements to which registered fund CPOs already are subject, we believe more comprehensive harmonization in this area is necessary, appropriate, and consistent with the Commission's stated intention. Accordingly, we are recommending a substituted compliance approach to recordkeeping similar to the approach to disclosure provided by the Harmonization Release.

Moreover, while the Harmonization Release focused solely on registered fund CPOs, we believe relief also is needed for registered fund CTAs; otherwise, harmonization relief would apply to registered fund advisers but not also to registered fund sub-advisers.²⁰ Importantly, the SEC's rules under the Investment Company Act and the Advisers Act do not distinguish between registered fund advisers and sub-advisers (or advisers or sub-advisers to CFCs) — they are each treated as an "adviser" and required to be registered under the Advisers Act. Thus, not providing relief for registered fund CTAs as we request will undercut the benefit of substituted compliance for registered funds.²¹

We also request similar treatment for excluded and exempt CPOs and CTAs, in which the Commission has a limited regulatory interest. These entities certainly should not be subject to any greater requirements under the CEA and CFTC regulations than registered fund CPOs and CTAs. As registered fund advisers and sub-advisers, excluded and exempt CPOs and CTAs are subject to comprehensive recordkeeping requirements under the Investment Company Act and Advisers Act.

¹⁹ For example, while the Harmonization Release exempted registered fund CPOs from the Account Statement preparation and distribution requirements under CFTC Regulation 4.22(a) and (b), it did not contain a corresponding exemption from maintaining books and records relevant to such Account Statements required by paragraphs (a)(10), (a)(11), and (a)(12) of CFTC Regulation 4.23. As a further example, CFTC Regulations 4.23(b)(1)-(3) require a CPO to keep records regarding the proprietary commodity interest trading of the CPO itself and of its principals as well as the confirmations of those transactions. However, registered fund CPOs that cannot comply with CFTC Regulation 4.5 are only required to show the CPO's related performance in the registered fund's disclosure documents if the pool has less than three years of operating history. There is no requirement to show the performance of the CPO's or principals' proprietary trading under CFTC Regulation 4.12(c). Thus, there should be no record maintenance requirement for a record that is not otherwise substantively required by the applicable CFTC rules.

²⁰ See *Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations* (Aug. 14, 2012), which postponed the recordkeeping, reporting, and disclosure compliance obligations for registered fund CTAs until "60 days following the effective date of a final rule implementing the Commission's proposed harmonization effort." Unfortunately, the Harmonization Release did not address the compliance obligations for registered fund CTAs.

²¹ In the absence of substituted compliance treatment for registered fund CTAs, registered fund CTAs are subject to incongruous recordkeeping requirements under CFTC regulations. For example, CFTC Regulations 4.33(b)(1) and 4.33(b)(2)(i) and (ii) require a CTA to keep records regarding the proprietary commodity interest trading of the CTA itself and of its principals. However, the performance of a CTA that is not the registered fund CPO is not required to be included in the registered fund's disclosure document under CFTC Regulation 4.12(c)(3)(i)(A). Thus, there should be no corresponding recordkeeping requirement.

Specifically, registered funds and their advisers and sub-advisers are subject to long-established requirements under the Investment Company Act and the Advisers Act with respect to the maintenance of a broad range of books and records, including records with respect to any CFC of a registered fund. These records, whether maintained by the adviser, sub-adviser, or other third party, are readily accessible by the SEC, and would be readily accessible by the CFTC under our suggested amendments. The SEC's recordkeeping rules under the Investment Company Act and the Advisers Act provide comprehensive recordkeeping requirements with respect to registered investment advisers and registered funds, and also include requirements that apply with respect to CFCs, generally requiring the same types of records be maintained as are required under the CFTC's regulations. As detailed in Appendix B,²² we believe that these existing recordkeeping requirements serve the same purposes as, and in some respects are more extensive than, those set forth in CFTC Regulations 4.23 and 4.33. Any comparison of the regulatory frameworks taking an outcomes-based approach clearly justifies permitting substituted compliance.

The manner in which records are required to be maintained under the Investment Company Act and the Advisers Act is comparable to the requirements under the Proposal, both respect to retention periods and general retention requirements, as well as the maintenance of electronic records.²³ For example, the rules under both the Investment Company Act and the Investment Advisers Act provide a principles-based approach to electronic storage and maintenance that is intended to ensure, like the Commission's Proposal, the records' and recordkeeping systems' authenticity and reliability.²⁴

Amending Regulations 1.31, 4.12(c), 4.23, and 4.33 to permit substituted compliance by (i) registered fund CPOs and CTAs; (ii) excluded and exempt CPOs and CTAs; and (iv) third parties that maintain required records on behalf of registered fund CPOs and CTAs and/or excluded and exempt CPOs and CTAs is fully consistent with the goals of the Harmonization Release and the protection of investors. Providing substituted compliance also will further the goals outlined by Trump Administration in its recent executive orders,²⁵ and Acting Chairman Giancarlo's new agenda for the CFTC.²⁶ Our recommendations further these objectives by:

²² Appendix B contains a comparison of the content of records required to be kept under the CFTC's regulations and the SEC's rules under the Investment Company Act and the Advisers Act.

²³ See *Proposing Release*, *supra* note 2 at text accompanying n.23 (comparing the retention periods under the Investment Company Act and the Advisers Act with the requirements under the Proposal); *Id.* at text accompanying n.24 (Commission notes that its proposed records retention requirements for records entities retaining electronic records are "not new and are consistent with certain SEC requirements.").

²⁴ *Cf.* proposed Regulation 1.31(d)(2) with Investment Company Act Rule 31a-2(f) and Advisers Act Rule 204-2(g).

²⁵ See *supra* note 7.

²⁶ See *A New Direction Forward*, *supra* note 8.

- Avoiding regulatory duplication and burdens, including the imposition of unnecessary recordkeeping burdens and costs on funds, costs that are ultimately borne by fund shareholders.
- Streamlining regulatory responsibilities consistent with the Acting Chairman’s goal of resetting the CFTC’s focus on its core mission. Substituted compliance allows the CFTC to leverage the existing regulatory regime of a parallel market regulator – the SEC – which already comprehensively regulates the recordkeeping obligations of registered fund advisers. Permitting substituted compliance avoids registered fund advisers being subject to confusing, overlapping, and potentially conflicting, recordkeeping requirements imposed by both the CFTC and the SEC.
- Importantly, substituted compliance will result in no loss of investor protection. As detailed in Appendix B, registered fund advisers are subject to recordkeeping requirements under the Investment Company Act, Advisers Act, and rules thereunder, that are comparable to those under the CEA and its regulations and, arguably, more extensive in some instances. These rules are tailored specifically to the operations of registered investment advisers and the registered funds and the CFCs they manage. This comprehensive recordkeeping regime serves the same regulatory purposes as the CFTC’s recordkeeping regulations, and is fully consistent with the protection of investors.

II. Support for the Comments Provided by the Associations

ICI consistently has advocated for harmonization of regulations between the CFTC and SEC to prevent the imposition of duplicative or unduly burdensome regulation on our members that advise registered funds. We have also been in contact with the Associations with respect to the current rulemaking proceeding and express our support for the comments made by the Associations.²⁷ Many SEC-registered investment advisers that advise registered funds also advise, or have affiliates that advise, private funds or separately managed accounts. Accordingly, we recommend that the Commission, in addition to providing for substituted compliance, as we request, address the Associations’ concerns, including limiting the definition of “records entity” under the Proposal to Commission registrants.

²⁷ Associations Comment Letter, *supra* note 10.

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Please note that our proposed revisions to Regulations 4.23 and 4.33 would delete the requirement that registered CPOs and CTAs maintain their records at their main business office, and also remove the provision in Regulation 4.23 that conditions relief for CPOs on certain requirements. As the Associations note in their comment letter, no other Commission registrants are required to keep their books and records at their main business office, and accordingly, we believe that no registered CPO or CTA should be required to do so either.

* * * *

We appreciate the Commission's consideration of our comments. If you have questions or require further information, please contact me at (202) 326-5815, Sarah A. Bessin at (202) 326-5835, or Rachel H. Graham at (202) 326-5819.

Sincerely,

/s/ David W. Blass

David W. Blass
General Counsel

cc: The Honorable J. Christopher Giancarlo, Acting Chairman
The Honorable Sharon Y. Bowen, Commissioner
Eileen T. Flaherty, Director
Frank Fisanich, Chief Counsel
Katherine Driscoll, Associate Chief Counsel
Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission

APPENDIX A

Text of Proposed Rule Amendments

Suggested additions to current regulations in *bold italics*. Suggested deletions in ~~strikethrough~~.

§1.31 Regulatory records: retention and production.

* * * * *

(f) The requirements of this section shall not apply to (1) entities that are registered as investment advisers under the Investment Advisers Act of 1940 but that are excluded from the definition of “commodity pool operator” under §4.5(a)(1) or (2) to commodity trading advisors that are registered as investment advisers under the Investment Advisers Act of 1940 but are exempted from registration as commodity trading advisors under §4.14(a)(8) or otherwise, in each case to the extent the required records relate to (i) investment companies registered under the Investment Company Act of 1940 that they advise, (ii) controlled foreign corporations thereof that they advise, and/or (iii) business development companies that have made an election under Section 54 of the Investment Company Act and that continue to be regulated by the Securities and Exchange Commission as business development companies. The requirements of this section shall also not apply to any third parties that maintain required records on behalf of any entity listed above in subsections (f)(1) or (f)(2), with respect to a registered investment company, controlled foreign corporation, and/or business development company.

§4.12 Exemption from provisions of part 4.

* * * * *

(c) * * *

(3) * * *

* * * * *

(iii) Exemption from the provisions of §4.23 that require that a pool operator's books and records be made available to participants for inspection and/or copying at the request of the participant. The pool operator of an offered pool and any third party that maintains books and records on behalf of an offered pool or the commodity pool operator thereof, will be exempt from the requirements of §4.23; Provided, that (A) the pool's books and records, the books and records of any controlled foreign corporation of the pool and the pool operator's books and records are maintained in accordance with

the Investment Advisers Act of 1940 and/or the Investment Company Act of 1940, and applicable regulations thereunder, and (B) any such records are made available for inspection upon request by an authorized representative of the Commission or the United States Department of Justice.

* * * * *

§4.23 Recordkeeping

Each commodity pool operator registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner. ~~Books and records that are not maintained at the pool operator's main business office shall be maintained by one or more of the following: the pool's administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool.~~ All books and records shall be maintained in accordance with §1.31. All books and records required by this section except those required by paragraphs (a)(3), (a)(4), (b)(1), (b)(2) and (b)(3) must be made available to participants for inspection and copying during normal business hours. Upon request, copies must be sent by mail to any participant within five business days if reasonable reproduction and distribution costs are paid by the pool participant. If the books and records are maintained ~~at the commodity pool operator's main business office that is~~ outside the United States, its territories or possessions, then upon the request of a Commission representative, the pool operator must provide such books and records as requested at the place in the United States, its territories or possessions designated by the representative within 72 hours after the pool operator receives the request.

* * * * *

~~(c) If the pool operator does not maintain its books and records at its main business office, the pool operator shall:~~

~~(1) At the time it registers with the Commission or delegates its recordkeeping obligations, whichever is later, file a statement that:~~

~~(i) Identifies the name, main business address, and main business telephone number of the person(s) who will be keeping required books and records in lieu of the pool operator;~~

~~(ii) Sets forth the name and telephone number of a contact for each person who will be keeping required books and records in lieu of the pool operator;~~

~~(iii) Specifies, by reference to the respective paragraph of this section, the books and records that such person will be keeping; and~~

~~(iv) Contains representations from the pool operator that:~~

(A) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by this section changes, by identifying in such amendment the new location and any other information that has changed;

(B) It remains responsible for ensuring that all books and records required by this section are kept in accordance with § 1.31;

(C) Within 48 hours after a request by a representative of the Commission, it will obtain the original books and records from the location at which they are maintained, and provide them for inspection at the pool operator's main business office; Provided, however, that if the original books and records are permitted to be, and are maintained, at a location outside the United States, its territories or possessions, the pool operator will obtain and provide such original books and records for inspection at the pool operator's main business office within 72 hours of such a request; and

(D) It will disclose in the pool's Disclosure Document the location of its books and records that are required under this section.

(2) The pool operator shall also file electronically with the National Futures Association a statement from each person who will be keeping required books and records in lieu of the pool operator wherein such person:

(i) Acknowledges that the pool operator intends that the person keep and maintain required pool books and records;

(ii) Agrees to keep and maintain such records required in accordance with § 1.31 of this chapter; and

(iii) Agrees to keep such required books and records open to inspection by any representative of the Commission or the United States Department of Justice in accordance with § 1.31 of this chapter and to make such required books and records available to pool participants in accordance with this section. *Notwithstanding the foregoing, if a commodity pool operator is registered as an investment adviser under the Investment Advisers Act of 1940 and is advising an investment company registered under the Investment Company Act of 1940, a controlled foreign corporation of such investment company, and/or a business development company that has made an election under Section 54 of such act and continues to be regulated by the Securities and Exchange Commission as a business development company, such commodity pool operator, and any third-party that maintains books and records on behalf of an offered pool or the commodity pool operator thereof, must keep only the books and records with respect to such entities that are required by, and such books and records shall be kept in accordance with, as applicable, the requirements of the Investment Advisers Act of 1940 and the Investment Company Act of 1940, and applicable regulations thereunder; Provided, that such books and records are made available for inspection upon request by an authorized representative of the Commission or the United States Department of Justice.*

§4.33 Recordkeeping.

Each commodity trading advisor registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner ~~at its main business office and~~ in accordance with §1.31. If the ~~commodity trading advisor's main business office is located~~ ***books and records are maintained*** outside the United States, its territories or possessions, then upon the request of a Commission representative the commodity trading advisor must provide such books and records as requested at the place designated by the representative in the United States, its territories or possessions within 72 hours after receipt of the request.

* * * * *

(c) Notwithstanding the foregoing, if a commodity trading advisor is registered as an investment adviser under the Investment Advisers Act of 1940 and is advising an investment company registered under the Investment Company Act of 1940, a controlled foreign corporation of such investment company, and/or a business development company that has made an election under Section 54 of such act and continues to be regulated by the Securities and Exchange Commission as a business development company, such commodity trading advisor, and any third party that maintains books and records on behalf of the commodity trading advisor, must keep only the books and records with respect to such entities that are required by, and such books and records shall be kept, in accordance with, as applicable, the requirements of the Investment Advisers Act of 1940 and the Investment Company Act of 1940, and applicable regulations thereunder; Provided, that such books and records are made available for inspection upon request by an authorized representative of the Commission or the United States Department of Justice.

* * * * *

APPENDIX B

This exhibit compares the books and records that registered funds and their registered investment advisers (including advisers and sub-advisers to registered funds) are required to maintain under SEC rules with the books and records that CPOs and CTAs are required to maintain under the CFTC's Part 4 regulations. Investment advisers and sub-advisers also are required to maintain similar records under the Advisers Act with respect to CFCs. In addition, registered funds are required, under the Investment Company Act, to maintain books and records relating to CFCs in connection with preparing consolidated financial statements for the registered fund.

I. Comparable Records

The books and records that registered funds and registered investment advisers are required to maintain under the Investment Company Act, the Advisers Act, and the rules promulgated thereunder are generally equivalent to, and serve the same purposes as, the required books and records under CFTC Regulations 4.23 and 4.33 under the CEA. Examples of comparable records required to be maintained under the two regulatory regimes include the following:

- Journals containing an itemized daily record of all purchases or sales of securities and commodity interest transactions;²⁸
- General ledgers or other records reflecting, among other things, all asset, liability, capital, income and expense accounts;²⁹
- Separate ledger accounts (which may be maintained by a transfer agent) showing for each shareholder of record or commodity pool participant the securities or commodity interests held;³⁰
- Check books, bank statements, cancelled checks, and cash reconciliations and all bills or statements (or copies thereof);³¹
- Notices, circulars, advertisements, newspaper articles, investment letters, bulletins or other communications sent to clients and prospective clients;³²

²⁸ Cf. CFTC Regulations 4.23(a)(1), 4.23(a)(2), and 4.33(b)(1), with Investment Company Act Rule 31a-1(b)(1) and Advisers Act Rule 204-2(a)(1).

²⁹ Cf. CFTC Regulation 4.23(a)(6) with Investment Company Act Rule 31a-1(b)(2) and Advisers Act Rule 204-2(a)(2).

³⁰ Cf. CFTC Regulation 4.23(a)(4) with Investment Company Act Rule 31a-1(b)(iv).

³¹ Cf. CFTC Regulations 4.23(a)(8) and 4.23(b)(3) with Advisers Act Rules 204-2(a)(4) and (a)(5).

³² Cf. CFTC Regulations 4.23(a)(9) and 4.33(a)(7) with Advisers Act Rule 204-2(a)(11).

- Powers of attorney and other documents granting the CTA, registered investment adviser or registered fund sub-adviser discretionary authority over a client’s assets or account;³³ and
- Copies of written agreements with clients.³⁴

II. Additional Records Under SEC Rules

The recordkeeping requirements under the Investment Company Act and the Advisers Act also impose additional recordkeeping obligations on registered funds and registered investment advisers (including sub-advisers to registered funds) that are not required under the CFTC’s Part 4 regulations. Examples of additional records required to be maintained by registered funds and registered investment advisers (including sub-advisers to registered funds) include the following:

- The registered fund’s corporate charter, certificate of incorporation, and by-laws, as well as minute books of stockholders’ and directors’ meetings;³⁵
- All bills or statements (paid or unpaid), trial balances, financial statements, and internal audit working papers related to the business of a registered fund adviser or sub-adviser;³⁶
- Communications sent to or received by a registered fund adviser or sub-adviser that detail proposed investment advice, any receipt, disbursement, or delivery of funds or securities, or the placing or execution of any order to purchase or sell any security;³⁷
- A copy of the code of ethics of a registered fund adviser and sub-adviser, and records of any violation of the code of ethics and any action taken as a result of such violation;³⁸
- A record of certain securities transactions in which a registered fund adviser or sub-adviser or its “access persons” have a direct or indirect beneficial ownership or interest;³⁹
- Copies of performance advertisements and documents necessary to form the basis for or demonstrate the calculation of such performance information;⁴⁰

³³ Cf. CFTC Regulation 4.33(a)(3) with Advisers Act Rule 204-2(a)(9).

³⁴ Cf. CFTC Regulation 4.33(a)(4) with Advisers Act Rule 204-2(a)(10).

³⁵ Investment Company Act Rule 31a-1(b)(4).

³⁶ Advisers Act Rule 204-2(a)(5) and (6).

³⁷ Advisers Act Rule 204-2(a)(7).

³⁸ Advisers Act Rules 204-2(a)(12)(i) and 204-2(a)(12)(ii).

³⁹ Advisers Act Rule 204-2(a)(13).

⁴⁰ Advisers Act Rule 204-2(a)(16).

- Copies of a registered fund adviser and sub-adviser’s brochures and brochure supplements, and each amendment or revision thereto;⁴¹
- Copies of a registered fund adviser’s and sub-adviser’s policies and procedures, as well as any records documenting the annual review of such policies and procedures;⁴²
- Records that substantiate compliance with the “pay-to-play” rules under Rule 206-4(5) under the Advisers Act;⁴³
- Records (*e.g.*, questionnaires or other documents) of each initial and subsequent determination that a director is not an interested person of a registered fund, as well as any materials used by the registered fund’s “disinterested” directors to determine that the person who is acting as legal counsel to the directors is independent;⁴⁴ and
- Documents related to the approval or renewal of contracts between a registered fund and its adviser and/or sub-adviser.⁴⁵

Based on the significant overlap between the content of the required records under the SEC’s and CFTC’s regimes, as well as the additional recordkeeping requirements under the SEC’s rules, we believe that compliance with the SEC’s books and records rules by (i) registered fund CPOs and CTAs; (ii) excluded and exempt CPOs and CTAs; (iii) third parties that maintain required records on behalf of registered fund CPOs and CTAs and/or excluded and exempt CPOs and CTAs, is fully consistent with investor protection and should be permitted in lieu of compliance with the CFTC’s recordkeeping regulations.

⁴¹ Advisers Act Rule 204-2(a)(14)(i).

⁴² Advisers Act Rule 204-2(a)(17).

⁴³ Advisers Act Rule 204-2(a)(18).

⁴⁴ Investment Company Act Rule 31a-2(a)(5).

⁴⁵ Investment Company Act Rule 31a-2(a)(6).